

1
2 IN THE UNITED STATES DISTRICT COURT

3 FOR THE DISTRICT OF OREGON

4 PENDLETON DIVISION

5 UNITED STATES OF AMERICA,)

6 Plaintiff,)

Case No. 2:11-CV-00823-SU

7 v.)

8 HAMMOND RANCHES, INC., an Oregon) July 26, 2013

9 Corporation,)

10 Defendant.)

Portland, Oregon

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14 ORAL ARGUMENT

15 TRANSCRIPT OF PROCEEDINGS

16 BEFORE THE HONORABLE PATRICIA SULLIVAN

17 UNITED STATES DISTRICT COURT MAGISTRATE JUDGE
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TELEPHONIC APPEARANCES

FOR THE PLAINTIFF:

Neil J. Evans
United States Attorney's Office
1000 SW Third Avenue
Room 600
Portland, OR 97204

FOR THE DEFENDANT HAMMOND RANCHES:

Brent H. Smith
David Baum
Baum Smith & Eyre, LLC
1902 Fourth Street
Suite 1
P.O. Box 967
La Grande, OR 97850

FOR THE DEFENDANT DWIGHT HAMMOND:

Marc D. Blackman
Ransom Blackman, LLP
1001 SW Fifth Avenue
Suite 1400
Portland, OR 97204

COURT REPORTER: Jill L. Erwin, CSR, RMR, RDR, CRR
Certified Shorthand Reporter
Registered Merit Reporter
Registered Diplomate Reporter
Certified Realtime Reporter

United States District Courthouse
1000 SW Third Avenue, Room 301
Portland, OR 97204
(503)326-8191

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1 TRANSCRIPT OF PROCEEDINGS

2 DEPUTY COURTROOM CLERK: This is the United States
3 of America v. Hammond Ranches, Inc., et al. Civil Case
4 No. 2:11-CV-00823-SU. Defendant's motion for stay number 24
5 and defendant's motion for protective order number 27.
6 Judge Sullivan presiding.

7 Counsel, since we're just now on the record, please
8 state your appearances. And let me remind you to identify
9 yourselves each time you speak.

10 Go ahead, counsel for plaintiff.

11 MR. EVANS: Neil Evans on behalf of the United
12 States.

13 MR. SMITH: Brent Smith and David Baum on behalf
14 of defendants.

15 MR. BLACKMAN: Marc Blackman on behalf of
16 Dwight Hammond.

17 THE COURT: All right. Counsel, thank you for
18 making yourselves available this afternoon. I want to just
19 sort of recite where we are in this case before I hear from
20 the attorneys, and I'll tell you how -- what my
21 understanding is of the civil as well as the criminal
22 matters.

23 The case has -- the civil -- I'll start with the civil
24 complaint. It's been stayed from October 11, 2011, until
25 January 14, 2013. Is that correct?

1 I'll ask Mr. Evans to respond.

2 MR. EVANS: I don't know the specific dates, but
3 that sounds accurate, Your Honor. I did not look at the
4 docket.

5 THE COURT: Oh, okay. I did, and I believe that's
6 accurate. Discovery -- we had a conference call, I believe,
7 and the stay was lifted. And discovery was supposed to be
8 completed by October 15th, 2013, which is still a couple of
9 months away.

10 Is it correct, Mr. Evans, that you -- the Government is
11 no longer seeking injunctive relief?

12 MR. EVANS: We moved to dismiss and I believe it's
13 granted the dismissal of Count 10 which sought basically
14 permanent injunctive relief voiding or cancelling the
15 grazing permit.

16 THE COURT: Okay. The permit. So that has been
17 dropped. That was my next question.

18 I'm going to recite to you the claims as they appear in
19 the complaint and then, Mr. Evans, you'll correct me if I'm
20 wrong. Okay?

21 MR. EVANS: Yes, Your Honor.

22 THE COURT: We have negligence claims against
23 Hammond Ranches for the 2005 Fir Creek fire, the 2006 Krumbo
24 Butte fire, the 2006 Lower Bridge Creek fire, and the 2006
25 Grandad fire; correct?

1 MR. EVANS: Correct, Your Honor.

2 THE COURT: We have a trespass claim against
3 Steven Hammond only for the 2005 Fir Creek fire and the 2006
4 Krumbo Butte fire; correct?

5 MR. EVANS: Correct.

6 THE COURT: We have a trespass claim against
7 Steven Hammond and Dwight Hammond for the 2006 Lower Bridge
8 Creek fire and the 2006 Grandad fire; correct?

9 MR. EVANS: Correct.

10 THE COURT: And we have trespass claims -- or
11 claim of trespass against Hammond Ranch, Inc., on the basis
12 of all of those fires; correct?

13 MR. EVANS: Correct.

14 THE COURT: All right. So that's the civil
15 complaint.

16 Now, with regard to the criminal complaint, Mr. Smith,
17 I want to see if I have an understanding of what occurred.
18 And perhaps Mr. Blackman can help out with this.

19 Mr. Blackman, weren't you one of the criminal defense
20 attorneys here in Pendleton? Hello?

21 DEPUTY COURTROOM CLERK: Mr. Blackman?

22 THE COURT: Hello? Is Mr. Blackman there?

23 MR. BLACKMAN: Yes.

24 THE COURT: Were you one of the criminal defense
25 attorneys -- attorneys here in Pendleton?

1 MR. BLACKMAN: We continue to represent the
2 Hammonds on the Government's appeal.

3 THE COURT: And do you represent both Steven and
4 Dwight Hammond?

5 MR. BLACKMAN: Only Dwight.

6 THE COURT: Pardon?

7 MR. BLACKMAN: Only Dwight.

8 THE COURT: Only Dwight? And who represents
9 Steven?

10 MR. BLACKMAN: The criminal appeal?
11 Larry Matasar.

12 THE COURT: He is not on the line?

13 MR. BLACKMAN: No. He is (indiscernible.)

14 THE COURT: He is what?

15 MR. BLACKMAN: He is not counsel of record in the
16 civil case.

17 THE COURT: Okay. But are you?

18 MR. BLACKMAN: Yes.

19 THE COURT: Okay. All right. Now, let me see if
20 I understand what the criminal matter -- the disposition of
21 the criminal matter.

22 And, Mr. Blackman, you could probably respond.

23 Although, Mr. Smith, you can respond if I've got
24 something wrong here.

25 Steven and Dwight Hammond were convicted with regard to

1 the 2001 Hardie-Hammond fire; correct?

2 MR. BLACKMAN: Correct, yes.

3 THE COURT: Now, is that also called the Fir Creek
4 fire?

5 MR. BLACKMAN: No.

6 THE COURT: Just the Hardie-Hammond fire?

7 MR. BLACKMAN: Yes.

8 DEPUTY COURTROOM CLERK: Your Honor? Your Honor?

9 THE COURT: Yes.

10 DEPUTY COURTROOM CLERK: Could the gentlemen
11 identify themselves when they speak, because the court
12 reporter cannot identify them.

13 THE COURT: Okay. Yes. Please, gentlemen, please
14 do that.

15 All right. Now, with regard to the 2005 Fir Creek
16 fire, there's some confusion in my mind. Was this -- were
17 the charges with regard to that fire dismissed with or
18 without prejudice?

19 MR. BLACKMAN: This is Marc Blackman. They were
20 included in the indictment. The Government did not proceed
21 on that fire at the criminal trial, but it was part of the
22 overall conspiracy.

23 THE COURT: All right. Mr. Evans, what -- from
24 the Government's point of view, what is the disposition of
25 this -- the claims with regard to this fire in the criminal

1 matter?

2 MR. EVANS: My understanding is that the counts
3 related to the Fir Creek fire were dismissed without
4 prejudice as to Dwight and Steven Hammond before it -- I
5 take that back. It may have only been Steven Hammond before
6 the case went to trial.

7 THE COURT: And so are those, then, viable, in
8 terms of bringing a prosecution based on that fire against
9 Steven Hammond?

10 MR. EVANS: Theoretically, yes. The statute of
11 limitations hadn't run. Although, clearly, the AUSA decided
12 that he did not want to proceed to trial on a criminal
13 charge on the Fir Creek fire.

14 THE COURT: And I believe it's the position of the
15 plaintiffs that that is part of their argument in terms of
16 the Fifth Amendment; correct?

17 MR. SMITH: Your Honor, this is Brent Smith. I'm
18 looking at the United State's motion to dismiss the Fir
19 Creek counts, and I confirm that it's -- there's no
20 indication in the docket records or in this document that it
21 was dismissed with prejudice. Rather, it appears it was
22 dismissed without prejudice.

23 And, yes, Your Honor, part of our contention is that
24 they have a right not to make statements about this
25 particular matter, and it was charged previously and then

1 dismissed without prejudice.

2 THE COURT: Okay. Thank you for that
3 clarification.

4 Now, the 2006 Krumbo Butte fire resulted in a
5 conviction against Steven Hammond only; correct?

6 MR. SMITH: This is Brent Smith. That is correct.

7 THE COURT: And that is -- the Government has
8 appealed the sentence in that case; is that right?

9 MR. BLACKMAN: This is Marc Blackman. Yes,
10 Your Honor.

11 THE COURT: Have the defendants, Steven and Dwight
12 Hammond, appealed the convictions against --

13 MR. BLACKMAN: No, they have not.

14 THE COURT: All right.

15 MR. BLACKMAN: Part of the agreement that resolved
16 the case during the middle of jury deliberations was that
17 the Hammonds would not appeal.

18 THE COURT: Okay. Now, with regard to the Lower
19 Bridge Creek fire in 2006 and the Grandad fire in 2006, both
20 of the criminal claims with regard to those fires ended up
21 in acquittal; right?

22 MR. BLACKMAN: I believe the jury -- this is
23 Marc Blackman. I believe the jury acquitted Dwight Hammond
24 and Steven Hammond of Lower Bridge Creek, and they have not
25 yet come to a conclusion, as to Steven Hammond, as to the

1 Lower Bridge Creek fire -- excuse me, the Grandad fire.

2 THE COURT: Grandad fire.

3 So then what was the result of that? Was that part of
4 your deal at the end?

5 MR. BLACKMAN: Well, part of the deal was that the
6 parties would accept Judge Hogan's sentences of
7 Steven Hammond on the Krumbo Butte and the -- well, the 2001
8 fire and --

9 THE COURT: And Steven --

10 MR. BLACKMAN: -- and with respect to Dwight on
11 the 2001 fire.

12 THE COURT: Okay. So Steven was convicted of the
13 2001 fire and the Krumbo Butte fire.

14 MR. BLACKMAN: Correct.

15 THE COURT: And the sentences that
16 were -- Judge Hogan issued are on appeal?

17 MR. BLACKMAN: By the Government.

18 By the Government, correct. Okay.

19 THE COURT: Now, the sentence against Dwight
20 Hammond is on appeal for the 2001 fire.

21 MR. BLACKMAN: Yes. Marc Blackman again. By the
22 Government.

23 THE COURT: By the Government.

24 So I'm a little bit confused about the 2006 Grandad
25 fire and what the final disposition of that -- that charge

1 is. Is it still a viable charge that can be brought against
2 the defendants?

3 MR. BLACKMAN: Your Honor, I wish I could give
4 you -- this is Marc Blackman. I wish I could give you a
5 definitive answer on that. One of the main issues on appeal
6 is whether the Government was bound to accept Judge Hogan's
7 judgment and have the case brought to an end, period, and
8 the Government has appealed that claim or at least has
9 rebutted that claim in their briefs, and the Ninth Circuit
10 at some point is going to tell us whether the Government is
11 bound or not bound.

12 MR. EVANS: This is Neil Evans on behalf of the
13 United States.

14 THE COURT: Yes.

15 MR. EVANS: It's my understanding that a finer
16 point could be put on that, which is whether or not the
17 Government is bound by the sentence is a -- as to the counts
18 of conviction is a distinct question from what happened to
19 the conspiracy, Count No. 1 in the indictment, and the 2006
20 Grandad fire, counts seven and eight. It's my understanding
21 that all three of those counts were dismissed with prejudice
22 as a result of the agreement that was entered into by
23 Mr. Blackman Mr. Matasar and the prosecutors during
24 deliberation, while the jury was still out.

25 So while Mr. Blackman may be correct that this --

1 incorrect that the sentence as to the counts of conviction
2 is being appealed and there's some question in his mind
3 about whether or not the Government is bound by the final
4 judgment, I don't think there's any open question about
5 whether or not the conspiracy count and the 2006 Grandad
6 accounts were dismissed with prejudice.

7 THE COURT: Mr. Blackman, do you agree with that?

8 MR. BLACKMAN: Your Honor, I do.

9 THE COURT: You do?

10 MR. BLACKMAN: Yes.

11 THE COURT: Okay. Well, thank you for indulging
12 me on this exercise, because it does have to do with my
13 questions with regard to discovery.

14 The Government has appealed these two sentences. I
15 honestly do not see any issue with regard to discovery on
16 the 2001 fire and the appeal of that, the sentences against
17 Steven and Dwight Hammond, unless, Mr. Blackman, you can
18 convince me otherwise.

19 MR. BLACKMAN: Your Honor --

20 THE COURT: They have no -- there's no lawsuit
21 with regard to -- to that -- to those charges.

22 MR. BLACKMAN: Your Honor, Marc Blackman. If I
23 could respond?

24 THE COURT: Yes.

25 MR. BLACKMAN: What Mr. Evans did not address in

1 his memo, and Mr. Smith did in his, is that the privilege
2 applies not only to questions of guilt or innocence, but
3 also to issues of punishment, and that unless and until
4 punishment is final, the privilege persists, because U.S.
5 Supreme Court authority says a trial court in sentencing may
6 consider any information that is reasonably reliable in
7 determining a sentence that is appropriate.

8 So the 2001 fire, the circumstances of that and of all
9 the other allegations against both Hammonds that could be
10 construed by the Government as showing some kind of
11 culpability on the Hammonds, who argue for a greater
12 sentence, should the Ninth Circuit vacate the current
13 sentences, would it be used against them in violation of the
14 privilege against self-incrimination.

15 THE COURT: And, Mr. Evans, do you disagree with
16 that?

17 MR. EVANS: I don't disagree that the Fifth
18 Amendment privilege can apply leading up to sentencing.
19 What I disagree with, as you can tell from the pleadings, is
20 that, generally speaking, this very minor or relatively
21 small area of concern does not justify staying the entire
22 civil case again. I think the issue on appeal is whether or
23 not the five-year mandatory minimum applies to the
24 particular counts of conviction.

25 I -- I think that the concern over whether or not we're

1 going to bring in some -- some information from 2005 or
2 2004, and I -- I don't necessarily even need to question
3 them about 2001. As Your Honor recognized, it's not an
4 issue.

5 I don't think that's going to be an issue at
6 sentencing. And the answer to that concern isn't let's stay
7 all of the discovery regarding the civil suit.

8 THE COURT: Well, I understand that the defendants
9 are all asking for a fairly blanket stay. What I try to do
10 is narrow down the issues that -- that perhaps can
11 be -- that perhaps the parties can go ahead with, in terms
12 of discovery, so that we can keep this case moving along.
13 My thought -- go ahead.

14 MR. BLACKMAN: This is Marc Blackman. I just want
15 to make sure the Court is aware of the U.S. Supreme Court
16 direction about this. In *United States v. Watts*, which is a
17 519 U.S. 148 1997 opinion, the Court held a jury verdict of
18 acquittal does not prevent the sentencing court from
19 consideration conduct underlying the acquitted charge so
20 long as that count has been proved by a preponderance of the
21 evidence. And the Ninth Circuit similarly held in *United*
22 *States v. Staten*, S-T-A-T-E-N, 466 F.3d 708, a 2006 opinion,
23 and --

24 THE COURT: Excuse me. 466 F.3d 708?

25 MR. BLACKMAN: Yes.

1 THE COURT: Okay.

2 MR. BLACKMAN: And the point is that anything a
3 defendant says about an event can be offered by the
4 Government in an effort to persuade the sentencing court,
5 who, in this case, will not be the judge who heard the
6 trial --

7 THE COURT: No. He's gone.

8 MR. BLACKMAN: -- to impose a greater sentence. I
9 think that Mr. Evans may be oversimplifying issues before
10 the Ninth Circuit.

11 For example, the Ninth Circuit might agree with us on
12 the merits, but the Eighth Amendment would be violated by
13 imposing a 60-month sentence, which is the mandatory minimum
14 in the statute, under the circumstances to Dwight Hammond,
15 whose guideline range was zero to six months, but still
16 say, well, three months was not sufficient, and remanded for
17 a new sentencing hearing, governed by the Eighth Amendment,
18 but allowing the Government to present all new evidence as
19 to what the actual sentence should be that the Court should
20 impose.

21 It's a very real problem for the Hammonds -- Dwight and
22 Steven -- where the Government was trying to get information
23 from them that it's not denying it would use if it could,
24 if -- if and when the case is remanded, the case may, in
25 fact, be affirmed, then the problem is gone unless it gets

1 appealed with that.

2 THE COURT: Oh, yeah.

3 All right. Mr. Evans, do you have a response to that?

4 MR. EVANS: Yes. I have two responses. One,
5 Supreme Court has also recognized that it's a difficult
6 choice to make whether to assert the privilege or suffer
7 maybe, perhaps in the civil case, the inference. It's
8 not -- that alone is not a basis for a stay. This choice is
9 made probably daily throughout the United States.

10 The second thing is I'm -- the purposes of going
11 forward in depositions, at least initially, I'm fine without
12 asking any questions about the 2001 fire.

13 THE COURT: Okay.

14 MR. EVANS: So I don't -- I don't know what the
15 concern is. I do have mentioned in my memo -- at the very
16 end I do have some proposal, but I'll let -- clearly, the
17 Court has some idea of how you want to proceed, so
18 I'll -- I'll let that -- I'll let Your Honor speak.

19 THE COURT: Yeah. I will want to hear about
20 those -- those proposals from each side. But, I think,
21 Mr. Evans, if -- regardless of any questions about the 2001
22 fire, I think -- Mr. Blackman, correct me if I'm wrong -- is
23 a concern about these other fires influencing a possible
24 increase in sentencing, a resentencing hearing. Am I right?
25 I mean, is the -- the --

1 MR. BLACKMAN: This is Marc Blackman. If you're
2 addressing me, yes.

3 THE COURT: Yes.

4 MR. SMITH: And, Your Honor, this is Brent Smith.
5 Yes. In the *Watts* case Mr. Blackman cited talks
6 specifically about how conduct that a person is acquitted of
7 or uncharged can come in at the sentencing.

8 THE COURT: Wait a minute. Let me ask you a
9 question, just for -- a factual question about that. Were
10 those charges -- and I haven't read the
11 case -- presentencing or post sentencing? In other words --
12 or pre-offense? This sentencing is for the 2001 fire, and
13 these other fires took place afterwards. And in the *Watts*
14 case I'm not sure if the other offenses were prior to the
15 offense for which the sentence was being appealed. Do you
16 see what I'm saying? Does that matter?

17 MR. SMITH: This is Brent Smith. I see what
18 you're saying, and I don't know whether the *Watts* case
19 addresses that or not.

20 THE COURT: Mr. Blackman?

21 MR. SMITH: Maybe Mr. Blackman does.

22 MR. BLACKMAN: I honestly, Your Honor, do not
23 recall at this time; but I will say I don't think it matters
24 at all.

25 THE COURT: Well, that's your opinion at this

1 time. I guess I'll have to read the case.

2 MR. BLACKMAN: Yes.

3 THE COURT: Because if the Court makes come kind
4 of distinction or if the facts are distinguishable with
5 regard to that issue, then I'll have to look at that.

6 Now, thank you for indulging me on these questions,
7 because this is -- this -- these issues do affect Steven and
8 Dwight Hammond. However, with regard to the corporation,
9 tell me why Susan Hammond cannot be deposed as the corporate
10 agent.

11 MR. SMITH: Your Honor, this is Brent Smith. The
12 issue is that she intends to assert her Fifth Amendment
13 right.

14 THE COURT: Right.

15 MR. SMITH: She -- there obviously is not an
16 active criminal matter against her at this time; however, we
17 have a number of fires occurring over a number of years.
18 The Government, in the past, was willing to indict Dwight
19 and Steven on 19 different fires. Many of the counts were
20 dismissed voluntarily. Some of them they were acquitted of,
21 as the Court is aware of. And so she, at this point in
22 time, whether she is the corporation's agent or not, she's
23 going to be asserting her Fifth Amendment right in a
24 deposition.

25 THE COURT: Did she testify in the criminal trial?

1 MR. SMITH: No. So I agree that the case is
2 stronger with respect to Dwight and Steven. There are very
3 obvious issues. With respect to Susan, the analysis is
4 different, but there still is -- the Court still has
5 discretion when someone isn't currently charged with a crime
6 to allow a stay of the civil proceeding for a period of
7 time.

8 And in this case it's certainly possible that there is
9 danger that Susan Hammond may be indicted with a crime,
10 given the Government's prior conduct.

11 THE COURT: Well, I just think that's really
12 speculative, Mr. Smith. And are the women, including --
13 what's her name? Earlyna Hammond? Are they represented by
14 their own counsel?

15 MR. BLACKMAN: Your Honor, this is Marc Blackman.
16 Not to my knowledge.

17 THE COURT: And who represents the corporation?

18 MR. SMITH: I do, Your Honor. This is
19 Brent Smith.

20 THE COURT: And do you represent any of the
21 individuals, Mr. Smith?

22 MR. SMITH: At this point we do represent Dwight
23 and Steven in connection with this litigation, but none of
24 the other individuals that are discussed in the brief.

25 THE COURT: All right. Well, this is my concern

1 with regard to Susan Hammond: I'm not -- I honestly don't
2 know why Earlyna Hammond would be deposed. Can someone
3 illuminate me about that?

4 MR. EVANS: Well -- this is Neil Evans -- there's
5 some indication that she's involved in corporate affairs. I
6 don't think she's an officer, but I've reviewed some
7 discovery and certainly, being -- being a potential witness
8 for the defense, I've got the right to ask her questions.
9 And if she says she doesn't know anything, she doesn't know
10 anything. But I certainly don't want her appearing at trial
11 and saying, you know, I was having lunch with Steven in Bend
12 at the time this fire was started.

13 THE COURT: Okay. So both of them are potential
14 witnesses.

15 MR. SMITH: Your Honor, may I be heard on the
16 issue that Mr. Evans just addressed?

17 THE COURT: Yes, of course.

18 MR. SMITH: The problem is that you have a 2006
19 fire where there were -- where there was a conviction of
20 Steve Hammond on the Krumbo Butte, on the Grandad. Lower
21 Bridge Creek fire there was not a conviction. And,
22 hypothetically, the Government could use this opportunity to
23 depose Earlyna to try and find out was she aware whether or
24 not Steven was involved in the Krumbo Butte fire, which he
25 was convicted of? Did she have conversations with him? We

1 don't need to go very far down that road, given the course
2 of conduct between the BLM and the Hammonds, to see that
3 there is a distinct possibility of criminal charges against
4 Earlyna Hammond.

5 And so that is why in my brief I represented to the
6 Court my understanding is if she is deposed she intends to
7 assert the Fifth Amendment right. My point is that there is
8 a -- while it may be speculative in the sense that the
9 Government hasn't brought charges against her, the
10 Government has brought charges in connection with these
11 fires that they now want to question her about.

12 THE COURT: All right. Thank you, Mr. Smith.

13 But they don't have separate criminal attorneys; right?

14 MR. SMITH: Your Honor, not that I'm aware of
15 right now, but they do have attorneys that they speak to. I
16 don't know who represents who. I can't really speak to
17 that.

18 THE COURT: You know, the request is to stay the
19 civil proceedings until the resolution of the Court of
20 Appeals case or the -- the expiration of the statute of
21 limitations on the criminal matters; correct?

22 MR. SMITH: Correct.

23 THE COURT: By my -- by my calculation, that would
24 be two to three years for the criminal matters.

25 Now, what -- what is to say that should the Court of

1 Appeals come back with a decision tomorrow on the two
2 gentlemen, Steven and Dwight Hammond, that the -- the two
3 women, the two wives, would still not -- would still be in
4 jeopardy?

5 MR. SMITH: That's right, Your Honor, but that
6 would present a very different question for the Court, and
7 we're not -- you know, we're -- certainly, if the Court is
8 considering staying it just pending resolution of the
9 criminal appeal, and then, you know, dealing with -- there
10 are some Fifth Amendment issues that need to be resolved at
11 that time, we can handle it that way.

12 There's certainly a much stronger case on our end for a
13 stay while this criminal appeal is pending, and I recognize
14 that. If the Court is willing to grant that portion of the
15 motion, we can readdress Susan and the others' Fifth
16 Amendment issues after the appeal is concluded.

17 THE COURT: Now, let me ask you this, Counsel:
18 What's the status of document discovery? Mr. Evans?

19 MR. EVANS: This is Neil Evans. I served requests
20 for production on the defense on February 6th. I had what I
21 consider to be an inadequate reply in March. There's
22 communication on file -- written communication with Mr. Baum
23 and Mr. Smith. In fact, I met with them in late March when
24 I was out in eastern Oregon. To date, I still don't have
25 full responses to the request for production. I -- you

1 know, I don't -- unless the Court really wants me to get
2 into detail, I think --

3 THE COURT: No. I just want to know if --

4 MR. EVANS: We've been trying to -- I've been
5 waiting since late June to get a final edition of a
6 protective order, so I can disclose -- something which I
7 agreed to sign, so I can disclose some documents to staff
8 that I need to disclose it to. I think it's fair to say
9 that I don't think we're going to meet that October 15th
10 deadline. But, as the Court can probably tell, if the stay
11 was lifted on January 14th, I served a request for
12 production three weeks later and was ready to go. And
13 initially we thought we would have depositions in June, but
14 because of what I consider to be a lack of response, we're
15 still waiting.

16 THE COURT: Okay. Now, from the other side,
17 Mr. Smith?

18 MR. SMITH: Thank you, Your Honor. This is
19 Brent Smith. We have had problems in producing discovery.
20 I think Mr. Evans would agree that he and I are trying to
21 work through those issues. We -- we have similar
22 dissatisfaction with some of the -- the Government's lack of
23 production, and we're trying to work through those. But the
24 problem, just so the Court is aware, is that much of the
25 ground that we're trying to cover was already covered in the

1 criminal matter. As a result, you know, we have had
2 thousands and thousands of pages which we have to figure out
3 whether or not they were previously produced or not and
4 whether or not it's work product, and Mr. Evans is -- the
5 Government's response is to -- some of our discovery
6 requests have been essentially, "You already have that
7 because it was produced in the criminal case."

8 And so we're trying to find a way to -- to make sure
9 that discovery is complete and we have everything, and we
10 don't end up in trial with a document that hasn't been
11 produced at the criminal case and someone objecting to it
12 and saying, well, you know, this wasn't actually -- this
13 isn't legitimate or authenticated.

14 But I'm -- I'm confident that if the Court does not
15 stay this matter that we will be able to work through most
16 of those disputes and hopefully, if -- if necessary, we'll
17 present a limited number of discovery disputes to the Court
18 for resolution.

19 THE COURT: All right. It sounds to me, because
20 you're still working on the document discovery and because I
21 have some work to do with regard to some further research
22 based on the cases that have been cited -- I did have an
23 opportunity to read the briefing and the affidavits of all
24 parties, and I appreciate you're being prompt with those,
25 but I certainly haven't exhausted my research. So this is

1 what I want to do today. First of all, I'd like to hear
2 from both of you, both sides, to see if there's any
3 resolution that we can come to that you all have -- can
4 suggest. And, secondly, I will tell you what I want to do
5 if -- if neither one of those options is satisfactory.

6 So I'll start with Mr. Evans. You alluded to the fact
7 that you may have some kind of a resolution to suggest, and
8 I'll hear that now.

9 MR. EVANS: Thank you, Your Honor. This is
10 Neil Evans. I propose that we postpone the depositions
11 until the week of September 16th, with an agreement from the
12 defense that I don't have to reserve the subpoenas. The
13 Court did not order a stay. The Government will serve
14 written interrogatories, pursuant to Rule 33, by next
15 Friday, August 2nd. The defendants will file or provide
16 objections or privilege assertions by August 23rd.

17 And then I think if the -- that -- I think that does a
18 couple of things. One, it obviates the need for an
19 immediate stay or a protective order; two, it allows all of
20 us to put, you know, meat to the bones, if you will, rather
21 than speaking hypothetically, to these potential Fifth
22 Amendment privilege assertions.

23 Obviously, I don't think that all my questions are
24 subject to a Fifth -- potential questions are going to be
25 subject to a Fifth Amendment privilege, and I don't think a

1 blanket stay of the case is appropriate, nor will all my
2 questions necessarily be objectionable. So I think that
3 gets some substance to the discussion.

4 Again, it obviates the need for an immediate stay or a
5 protective order, and it will allow the Court someday,
6 hopefully between, let's say, the August 23rd responses and
7 my proposed September 16th depositions, to -- to make some
8 rulings.

9 I think the other benefit to the postponing of the
10 depositions until that week is that I think Steven Hammond
11 will be released from the Bureau of Prisons, so he will be
12 back in Burns. And, initially, Mr. Baum and I or Mr. Smith
13 and I have been talking about taking the BLM employees'
14 depositions at or around the same time. For various
15 reasons, that didn't work out. I think, again, with some
16 more discovery, we can probably schedule the BLM employees
17 around that same time and can save us all some resources.

18 I think that the overall advantage is that the parties
19 in the courtroom know what the issues are exactly, and,
20 again, we can get to those other -- those other deponents.

21 THE COURT: All right. Now, Mr. Smith, do you
22 have a response to this? Is this something you discussed
23 with Mr. Evans?

24 MR. SMITH: Thank you, Your Honor. This is
25 Mr. Smith. We did not discuss this specific proposal. I do

1 have a partial response that I want the Court to make sure
2 it considers, to the extent that the Court ultimately denies
3 the motion for a stay and my folks have to respond to
4 written interrogatories or depositions. The problem in this
5 situation is not just the fact that if they answer questions
6 they can be used against them in the criminal proceeding.
7 The other problem is that if they assert their Fifth
8 Amendment rights in the civil proceeding, the fact that they
9 asserted those rights, of course, can be evidenced in the
10 civil proceeding and inferences can be drawn from that
11 evidence.

12 What I would represent to the Court is that we --
13 meaning Hammond Ranches, Inc., and the defendants -- would
14 like to provide testimony, but we would like to provide
15 testimony without exposing the folks involved to potential
16 criminal liability.

17 The Court, I think, has authority to prevent the
18 Government from -- from bringing up the fact that somebody
19 raised their Fifth Amendment right when the matter is
20 actually tried.

21 And so what might happen here, Your Honor, if the Court
22 follows Mr. Evans's proposal is that there would be
23 interrogatories, there might be some questions answered,
24 there might be some where the Fifth Amendment is raised, and
25 we want the Court to be cognizant of the fact that when the

1 danger -- if -- if at some point the danger in the minds of
2 the folks involved with the criminal prosecution or
3 increased sentencing is listed or is gone, we're going to
4 want the ability to withdraw our assertion of the Fifth
5 Amendment without any adverse consequences.

6 So I just wanted the Court to be aware of that.

7 THE COURT: Well, I'm aware of the risk to the
8 defendants in the civil matter. And here's what I'd like to
9 do: I think Mr. Evans's proposed resolution makes some
10 sense. I think it's ambitious with regards to the
11 deadlines, and so I -- especially the -- the responses. If
12 Mr. Evans can serve written interrogatories by August 2nd,
13 and I know that generally interrogatories are limited unless
14 the Court rules otherwise, and, Mr. Evans, would you want to
15 ask the Court to allow more than -- I think it's 25
16 questions on interrogatories.

17 MR. EVANS: Well, I think 20 -- I may regret this
18 as I'm drafting them next week, but I think 25 should
19 probably be sufficient. Let's say if I can get 40 to
20 Dwight, Steven, and the corporation, I think that would --
21 that would certainly give us the ability to look at the
22 substantive questions and responses and -- and stop dealing
23 with this issue in the hypothetical.

24 THE COURT: And, Mr. Smith, would you object to
25 that?

1 MR. SMITH: Him having 40 rather than 20? No, I
2 don't object to that.

3 THE COURT: Or 25. I don't know if it's 20 or 25.

4 MR. SMITH: It's 25.

5 THE COURT: I would -- because there's quite a few
6 questions being allowed, I would then allow you until at
7 least September 3rd -- September 2nd is Labor Day --
8 September 3rd to respond. That gives you 30 days.

9 And to the extent that you raise the privilege, then
10 I -- I want, you know, you to make sure you do that in the
11 questions that are propounded.

12 I think it's a good -- I think it's a good proposal.
13 I'm not -- I'm not going -- I'm not going to order a stay
14 right now. However, I am going to review the cases that
15 have been suggested, and I'm going to -- I'm going to go
16 ahead and take this under -- put it under advisement and
17 perhaps the issues will be resolved with -- with the use of
18 the interrogatories.

19 The other thing I want Mr. Smith to do, because he
20 raised this issue, is provide me the authority to exclude
21 evidence at trial with regard to the claim of the Fifth
22 Amendment privilege.

23 Can you do that for me, Mr. Smith?

24 MR. SMITH: Yes, Your Honor, I can do that for
25 you.

1 THE COURT: Give me a supplemental brief. I'll
2 allow Mr. Evans to respond.

3 So I'd like that brief at least by the time -- I'd like
4 that brief by September 3rd. Or, let's say -- let's use the
5 August 23rd date, and then we'll all have the benefit of
6 that briefing. Okay.

7 MR. SMITH: Okay. Your Honor.

8 THE COURT: Is that okay with you, Mr. Evans?

9 MR. EVANS: Yes, Your Honor.

10 THE COURT: And then you can respond to it. I'll
11 let you respond within seven days of that brief.

12 MR. SMITH: Your Honor, this is Mr. Smith.

13 THE COURT: Yes.

14 MR. SMITH: Our motion for a protective order,
15 which sought to cancel the August 1st depositions, is that
16 granted? I think that's all it sought.

17 THE COURT: I think Mr. Evans recognizes that the
18 depositions will not occur, so it is granted. So the
19 depositions will not occur. And to the extent that the
20 motion requests only that, that is granted.

21 MR. SMITH: Thank you, Your Honor. And as the
22 Court considers this matter and takes it under advisement,
23 there was no formal oral argument given, but some of the
24 issues that the Court has raised are related to some of the
25 cases we cited in our brief which deal with situations where

1 the Government, by seeing which questions the person refuses
2 to answer under the Fifth Amendment, can then notice weak
3 spots in the case, and that's an issue that's raised, and I
4 am just making the Court aware of it. As we review
5 interrogatories, we'll do the best that we can, but I
6 anticipate that that may be an issue.

7 THE COURT: Okay.

8 MR. BLACKMAN: And, Your Honor, this is
9 Marc Blackman.

10 THE COURT: Yes.

11 MR. BLACKMAN: I just want to note for the record
12 that it seems very unlikely that the status of the
13 Government's appeal would be any different on September 3rd
14 than it is today. The case is at issue. It's been fully
15 briefed. We do not have a notice from the Court setting
16 oral argument.

17 THE COURT: Okay.

18 MR. BLACKMAN: And I believe it is more likely
19 than not that the Ninth Circuit will have this matter before
20 it for at least several months beyond September.

21 THE COURT: Oh, I see. That's probably accurate,
22 Mr. Blackman. You know it would be helpful to me,
23 Mr. Blackman, if you would send me -- has it been fully
24 briefed?

25 MR. BLACKMAN: Yes.

1 THE COURT: Would you send me the briefs in the
2 matter? Can you send them by email; .pdf?

3 MR. BLACKMAN: We can do that for the briefs
4 themselves. As far as the excerpts of record, I think the
5 Government's excerpts of record was seven volumes.

6 THE COURT: Oh, well, I think I only need the
7 briefs which outline --

8 MR. BLACKMAN: Okay.

9 THE COURT: I don't want to read seven volumes. I
10 was here for part of that trial, and I can guarantee you I
11 don't want to read seven volumes of record. But I do want
12 to have a clear understanding of the issues that are raised
13 on appeal.

14 MR. BLACKMAN: Very well.

15 MR. EVANS: Your Honor, this is Neil Evans.

16 THE COURT: Yes.

17 MR. EVANS: I have a couple of issues. One is
18 relatively minor, but to the extent that I offered to
19 postpone the depositions until September 16th week, it seems
20 that the protective order request is -- is moot. And --

21 THE COURT: Yeah.

22 MR. EVANS: And I'd just hate to have on the
23 record, for later, misinterpretation by somebody that the
24 Court had to grant a protective order against depositions,
25 so I'd ask the Court just rendering it moot, and so

1 that -- that raises the question of are they indefinitely
2 postponed or should it -- I would prefer to set and say that
3 we have a date or a week for the depositions so that the
4 stay is a nonissue.

5 THE COURT: I tend to agree with you, Mr. Evans,
6 and I was going to say it was the -- the issue of the
7 protective order is moot, but I honestly, because you have
8 acquiesced and have taken that off the calendar, it's -- the
9 protective order is granted, but I think in the interest of
10 accommodation of the parties and keeping this going forward,
11 the minute order will reflect that because the Government
12 has taken the deposition dates off, the issue is moot. But
13 the subpoenas then are moot, and I would like to see some
14 cooperation with regard to the depositions so that subpoenas
15 will not have to be issued.

16 MR. SMITH: Your Honor, this is Brent Smith. I
17 think that we can do that. I cannot make assurances to
18 Mr. Evans about Earlyna Hammond.

19 THE COURT: Okay.

20 MR. SMITH: I don't know why I would have a
21 problem getting her there.

22 THE COURT: Okay. I think that's a fairly good
23 compromise with regard to that. So the issue of the
24 protective order is -- the depositions are taken off, and so
25 the issue of the protective order is moot.

1 No -- the -- the parties will collaborate on
2 depositions -- further depositions.

3 And Mr. Evans, because I've extended the time for the
4 interrogatories, I think the time for the depositions
5 perhaps should be extended. And I'm going to say
6 until October 16th or mid October. I don't have my calendar
7 right in front of me. If you need more time and can agree
8 on an extension, I would certainly grant it. Okay?

9 MR. EVANS: Thank you, Your Honor. I do agree
10 with Mr. Smith that we -- we have been talking, and we can
11 work through these things. Hopefully --

12 THE COURT: Very good.

13 MR. EVANS: -- as Mr. Smith indicates, there will
14 be limited issues for the Court to address with regard to
15 discovery.

16 THE COURT: Oh, I appreciate that, and I
17 appreciate your cooperative effort. That's what I have come
18 to expect from you gentlemen.

19 So the motion for stay is taken under advisement. The
20 depositions are -- the protective order, with regard to the
21 depositions -- August 1st were they -- is moot, because the
22 depositions are postponed until October 15th. And if that
23 ends up being a Saturday or a Sunday, just change it to 16th
24 or --

25 MR. EVANS: That's a Tuesday after the

1 Monday -- after the Monday Columbus Day federal holiday, so
2 that date actually works.

3 THE COURT: All right. Okay. All right. The
4 Government will serve written interrogatories to defendants
5 by August 2nd. Did I say August 2nd?

6 DEPUTY COURTROOM CLERK: Yes.

7 THE COURT: Yes.

8 MR. EVANS: Yes, Your Honor.

9 THE COURT: And the responses are due
10 September 3rd.

11 Mr. Smith will provide a supplemental brief with regard
12 to using testimony at trial on the assertion of the Fifth
13 Amendment privilege, and I -- if further briefing is
14 necessary, I'm going to let the parties know by email.
15 Okay. I may have questions.

16 MR. EVANS: Thank you. This is Neil Evans on
17 behalf of the United States.

18 THE COURT: So have I covered everything now,
19 Michelle, for the minute order?

20 DEPUTY COURTROOM CLERK: Yes. Thank you.

21 THE COURT: Okay. So if, indeed, I need some help
22 with regard to further briefing, I'll let the parties know.
23 Either Jenica will or -- it will probably be Jenica, okay.
24 And I'll try to articulate exactly what help I need. Okay.

25 MR. EVANS: Thank you, Your Honor.

1 MR. BLACKMAN: Your Honor, Marc Blackman here.

2 THE COURT: Yes.

3 MR. BLACKMAN: Do you want me to email those
4 briefs to your judicial assistant?

5 THE COURT: You know, just email them to me. I
6 think you have my email address, because I think I've gotten
7 some emails from you by mistake.

8 MR. BLACKMAN: Okay. I will.

9 THE COURT: Do you have an assistant named Pat?

10 MR. BLACKMAN: I do, and I -- I believe, because
11 of that, I deleted you.

12 THE COURT: Oh, okay. It's the -- it's
13 pat_sullivan@ord.uscourts.gov.

14 MR. BLACKMAN: All right. Thank you.

15 THE COURT: And I think it's just more expeditious
16 just to send them to me directly.

17 MR. BLACKMAN: All right. Thank you.

18 THE COURT: Okay. They won't be filed in the
19 case. And I just need them to -- just to familiarize myself
20 with what's being appealed. Okay.

21 MR. BLACKMAN: Very good.

22 MR. EVANS: Very good, Your Honor.

23 THE COURT: Is there anything else I can help with
24 today?

25 MR. EVANS: Nothing from the Government,

1 Your Honor. Thank you.

2 THE COURT: Well, thank you. And I hope you all
3 have a nice cool weekend.

4 MR. SMITH: Thanks. Your Honor.

5 MR. BLACKMAN: Thank you.

6 MR. EVANS: Thank you.

7 THE COURT: Thank you.

8 (Hearing concluded.)

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C E R T I F I C A T E

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3
4 UNITED STATES OF AMERICA,)
5)
6 Plaintiff,) Case No. 2:11-CV-00823-SU
7)
8 v.)
9)
10 HAMMOND RANCHES, INC., an Oregon)
11 Corporation,)
12)
13 Defendant.)
14 _____)

15 I certify, by signing below, that the foregoing is
16 a true and correct transcript of the record of proceedings
17 in the above-entitled cause. A transcript without an
18 original signature, conformed signature, or digitally signed
19 signature is not certified.

20 /s/Jill L. Erwin, CSR, RMR, RDR, CRR
21 _____

22 Official Court Reporter

23 Date: August 20, 2013
24
25